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DOCKET NO. 14-1226 (CONSOLIDATED WITH 14-1273 AND 15-1002)

In the United States Court of Appeals for the District of Columbia Circuit

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

TEAMSTERS UNION LOCAL NUMBER 174, et al.

Intervenors.

On Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

OAK HARBOR FREIGHT LINES, INC.'S REPLY TO NLRB's OPPOSITION TO MOTION FOR STAY OF MANDATE

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Oak Harbor Freight Lines, Inc. ("Oak Harbor") replies to the Opposition of the National Labor Relations Board ("the Board" or "NLRB") to Motion to Stay Mandate as follows:

I. ARGUMENT

A. Oak Harbor's Petition Will Raise Important Questions of Federal Law that Merit a Reasonable Probability of Supreme Court Review and Significant Possibility of Reversal.

There is a "reasonable probability" of Supreme Court review of Oak Harbor's Petition for a Writ of Certiorari ("Petition") given the importance of healthcare coverage on the national stage. The Board attempts to categorize this Court's Decision as "an unremarkable unfair-labor-practice finding based on established principles." (NLRB Opposition, p. 9.) To the contrary, the circumstances under which an employer can implement healthcare coverage for union employees is a critical issue worthy of Supreme Court review.

The Board claims that Oak Harbor's Petition will not raise important questions of federal law because it allegedly addresses only factual issues that generally do not merit Supreme Court review. (NLRB Opposition, pp. 6-7.) However, the Board mischaracterizes Oak Harbor's arguments. Oak Harbor is not claiming that the error is "erroneous factual findings," but instead that the facts amounted to the legal threshold necessary for "economic exigency." In other words, Oak Harbor intends to challenge the Decision's determination that the facts

of this case did not rise to the level of "economic exigency" as established by applicable law.

Here, Oak Harbor bargained to impasse with the Union over the issue of healthcare coverage for returning strikers. No agreement was reached. Oak Harbor applied its Company medical plan to the returning strikers to avoid a lapse in healthcare coverage. Time was of the essence, as the strikers were returning to work in February 2009. Under federal labor law, this is an economic exigency justifying Oak Harbor's actions. There is a reasonable probability that the Supreme Court will review this case to determine whether or not the facts of this case meet the legal threshold of "economic exigency." Such review is not only valuable to the parties involved in this proceeding, but also of great significance to bargaining parties throughout the nation who find themselves in a similar situation. Should the law require that employees suffer a lapse in healthcare coverage simply because their employer and union representatives are unable to reach an agreement to avoid such a lapse? This question should be firmly answered in the negative, and there is a reasonable probability that the Supreme Court will agree with Oak Harbor.

Additionally, the Board's claim that Oak Harbor has not previously argued that healthcare is an issue of "overriding importance" is incorrect. Oak Harbor's arguments concerning the importance of continued healthcare coverage have been

fully briefed before this Court as they relate to Oak Harbor's "economic exigency" claim. Healthcare coverage is of such "overriding importance" to satisfy the elements of an "economic exigency." This is even further reason for the Supreme Court to review this particular case.

B. Given the Legal Precedent Contrary to the Decision's Holding, There is a Significant Possibility of Supreme Court Reversal.

Contrary to the Board's assertions, Supreme Court review and reversal is likely in this case due to this Court's departure from equitable estoppel principles established in this Circuit and other Circuits. As addressed in Oak Harbor's Motion, the Decision at issue appears to have applied a standard applicable in cases involving governmental agencies. In particular, this Court has required a "definite representation" or "affirmative misconduct" upon which a party detrimentally relied when seeking to estop the government. *See, e.g.*, *Graham v. S.E.C.*, 222 F.3d 994, 1007 n.24 (D.C. Cir. 2000) (recognizing that a heightened standard for analyzing estoppel claims is required when a litigant is seeking to estop the government) (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 60, 104 S.Ct. 2218 (1984)); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (similar).

However, in prior precedent, this Court has long recognized that a party may be estopped from challenging another party's position by engaging in conduct indicating acquiescence (through inaction, silence, or otherwise). *Louis Werner*

Saw Mill Co. v. Helvering, 96 F.2d 539, 542 (D.C. Cir. 1938) (when a party "does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under belief that the transaction has been recognized, there is acquiescence….") (internal citations omitted); *Parker v. Sager*, 174 F.2d 657, 661 (D.C. Cir. 1949) (essential elements of equitable estoppel include "'[c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert...."') (quoting 19 Am.Jur., Estoppel, § 42).

Furthermore, this Court's sister Circuits recognize that affirmative or definite representations are not necessary to establish equitable estoppel. Rather, conduct, silence, inaction, or acquiescence, may all form the basis of an estoppel claim, so long as the other party relied to its detriment. *E.g.*, *Mabus v. Gen. Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011) ("[e]quitable estoppel requires: '(1) misleading conduct, which may include not only statements and actions but silence and inaction….'") (internal citations omitted); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 726 (2d Cir. 2001) ("we hold that a party may be estopped where that party makes a definite misrepresentation (or, in the present case, a misrepresentation by silence….")); *Lovell Mfg., a Div. of*

Patterson-Erie Corp. v. Exp.-Imp. Bank of U.S., 777 F.2d 894, 898 (3d Cir. 1985) ("[e]stoppel requires 1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things;…") (internal citations omitted); *N.Y. Trust Co. v. Watts-Ritter & Co.*, 57 F.2d 1012, 1014-15 (4th Cir. 1932) ("'Where a person…remains inactive for a considerable time, or by his conduct induces another to believe that he will not question a transaction, and that other, relying on such attitude, incurs material expenses, such person is estopped from impeaching the transaction to the other's prejudice'") (internal citation omitted); *In re Varat Enterprises*, 81 F.3d 1310, 1318 (4th Cir. 1996) ("….[Defendant] reasonably relied upon [plaintiff's] silence and passivity in withdrawing its own objection…."); *Nat'l Am. Ins. Co. of California v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (9th Cir. 1996) ("'The object of equitable estoppel is to 'prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so.'") (internal citations omitted); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 706 (9th Cir. 1989) ("[a] party, by his action or inaction, may cause another to act to his detriment"); *Fairview Vill. Dev. Corp. v. Amberhill Properties, LP*, 99 Fed.Appx. 87, 88-89 (9th Cir. 2004) (unreported) ("'[E]stoppel is available to a party to a contract that was led to rely upon a perceived waiver of a contract

provision'….'[T]here may be an estoppel by consent or acquiescence,….'") (internal citations omitted); *Crane Co. v. James McHugh Sons*, 108 F.2d 55, 59 (10th Cir. 1939) ("[s]ilence under circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred").

The appropriate legal standard for establishing an equitable estoppel claim is a substantial question of federal law likely to result in Supreme Court review. Given this Court's contrary analysis in the Oak Harbor case, there is substantial likelihood that this matter will be reviewed.

C. Oak Harbor Will Suffer Irreparable Harm if the Mandate is Not Stayed.

Despite the Board's contention, Oak Harbor has demonstrated irreparable harm will result if this Court does not grant a stay of mandate. (NLRB's Opposition, pp. 12-15.) The key is that the loss to Oak Harbor is irreparable. Contrary to the Board's argument, Oak Harbor is not claiming "mere" economic loss. Therefore, cases cited by the Board are not applicable. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.") (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)(per curiam)). The economic loss itself to Oak Harbor will be significant. However, it is the irreparable nature of the loss

that warrants a stay while Oak Harbor's Petition is pending. This is apparent based on several reasons.

First, it is clear that having to potentially pay millions of dollars to over a hundred individuals constitutes an irreparable loss if the Supreme Court decides that these funds must be refunded to Oak Harbor. Logistically, managing and tracking payments and refunds from hundreds of individuals and the Oregon Trust at issue is an administratively daunting task. The costs of administering these payments and refunds cannot be recovered. At issue here is not just one employee, but hundreds of individuals, unlike payment to a single employee in the *McBride* case cited by the Board. *McBride v. CSX Transp., Inc.*, 611 F.3d 316, 318 (6th Cir. 2010).

Second, if some individuals do not, or cannot, pay back the funds provided by Oak Harbor, Oak Harbor will be forced to file potentially dozens of separate collection actions. This is one of the primary reasons why the Supreme Court granted a stay in the *Ledbetter* and *Heckler* cases. *Ledbetter v. Baldwin*, 479 U.S. 1309, 107 S.Ct. 635 (1986) (Powell, J. in chambers); *Heckler v. Turner*, 468 U.S. 1305, 105 S.Ct. 2 (1984) (Rehnquist, J. in chambers). The Board's Opposition does not describe how these two Supreme Court cases are legally distinguishable from Oak Harbor's case. Instead, the Board merely argues that both cases indicated there was "strong indicia that the Supreme Court would reverse the lower

courts' decisions," (NLRB Opposition, p. 15.) which is of course part of the analysis of whether to grant a stay. The Supreme Court's *Ledbetter* and *Heckler* cases are indeed applicable to Oak Harbor's case because they both dealt with significant payments to a large number of individuals where recovery was doubtful. Therefore, a stay of mandate is warranted in Oak Harbor's case.

Finally, the NLRB's argument that the public would be harmed if a stay is granted is unavailing. (NLRB Opposition, pp. 15-16.) The facts of this case date back to 2008 and 2009: a stay pending resolution of Oak Harbor's Petition will not harm the public or the employees. The Board's Opposition appears to support Oak Harbor's argument in this regard by noting that "the compliance portion of the Board proceeding will take months just to calculate what is owed and to whom, let alone process any company challenges to those calculations." (NLRB Opposition, p. 14.) Therefore, granting a stay of mandate in this case would not work to delay any payments to the Oregon Trust or the individual employees.

In sum, a delay of a couple of additional months while the Supreme Court decides whether to hear Oak Harbor's Petition does not constitute sufficient harm to the public (or to interested third parties) to deny a stay, particularly compared to the irreparable harm to Oak Harbor if a stay is not granted.

II. CONCLUSION

For all of the reasons stated in Oak Harbor's Motion for Stay of Mandate and above, Oak Harbor respectfully requests that this Court grant its Motion.

Respectfully submitted this 3rd day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I caused to be electronically filed the foregoing *Oak Harbor Freight Lines, Inc.'s Reply to NLRB's Opposition to Motion for Stay of Mandate* with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system, which will serve a Notice of Docket Activity on registered CM/ECF participants.

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